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AN INQUIRY CONCERNING JUSTICE.¹

“JUSTICE,” said Daniel Webster, “is the greatest interest of man on earth.”

Alexander Hamilton, in the *Federalist*, declared “Justice is the end of government. It is the end of civil society. It has ever been, and ever will be, pursued until it be obtained, or until liberty be lost in the pursuit.”

Fiat justitia, ruat coelum,—Let there be justice though the heavens fall, has been crystalized into a maxim.

We often call our courts, courts of justice. Lawyers are termed officers of justice. The function of the whole judicial machinery of the state is said to be the administration of justice. We speak frequently, in dealing with legal matters, of “natural justice” and often of “abstract justice.” We also distinguish often between “legal justice,” or that which is administered between the parties to an action by the courts, and “social justice,” or that which regulates the rights, privileges and duties of individuals considered as members of society.

We distinguish sometimes between “restorative justice” and “distributive justice”,—a distinction which has the same foundation as that first mentioned, namely, justice administered by the judicial machinery which restores a man to his proper rights, and the justice which attends the distribution among men of the rights, privileges, immunities, duties and obligations which belong to them as members of society.

We also distinguish between “reparative justice” and “retributive justice,” or that which, on the one hand, secures to the deserving man his dues, and, on the other, to the undeserving man his deserts. In this sense, we pray for justice for ourselves and threaten it to our enemies.

This importance of the subject and this frequency of use would

¹ A paper read as the annual address before the State Bar Association of Nebraska in December, 1915.

naturally lead one to believe either that there is an established definition of justice or at any rate that a workable definition of justice is capable of being agreed upon. As said by Professor Ritchie in his book on "Natural Rights," in dealing with the subject of justice, laws and the State: "The man who speaks in the law courts or political assemblies speaks as if he knew what these terms meant." What, then, does justice mean? How is it to be defined?

Now, I am not so unwise as to believe that everything which exists is capable of being defined. For example, I believe that there is such a thing as life, but, so far as I know, no one has ever been able to give a satisfactory definition of it. We speak often of the "good", but what is "good"? Is it capable of being defined, or can we deal with it only relatively in comparison with other subjects? The age-old question which Pilate asked,—“What is truth?” remains still essentially unanswered, although upon every judicial trial every witness is sworn to tell “the truth, the whole truth, and nothing but the truth.” Nothing, it has been said, is more fascinating than the attempt to define the virtues, but nothing is more difficult.

Perhaps the same difficulty inheres in the case of justice. Is justice capable of being defined? Many attempts certainly have been made to define it, and a brief review of some of them, culled from wide sources and different times, may throw some light upon the problem. The opening paragraph of Justinian's Institutes declares "*Justitia est constans et perpetua voluntas ius suum cuique tribuendi*,"—Justice is the constant and perpetual wish to render every man his due.

Almost the whole of Plato's "Republic" is made up of the discussions which Socrates and his friends are reported to have had concerning the nature of justice. Eventually, in the discussion, justice comes to have a very general significance, being largely identified with virtue. But in the course of the discussion respecting the standard appealed to in the trial of causes before the courts, the question is asked,—“And are suits decided on any other ground but that a man may neither take what is another's nor be deprived of what is his own”. And the answer is, “Yes, that is their principle.” “It is a just principle?” “Yes.” “Then on this view also justice will be admitted to be the having and enjoying what is a man's owns and belongs to him?” “Very true.”

James Martineau, in his "Types of Ethical Theory," says, "Justice is the treatment of persons according to their deserts."

Herbert Spencer, in working out his "Synthetic Philosophy," devotes a volume to the consideration of Justice, as a part of Ethics. He attempts to show that even animals have standards by which they

determine the quality of actions, and that they punish the members of the animal group that violate the standard. The essence of this standard is that animals shall have and do in accordance with their nature and functions. He then proceeds to develop the idea of a subhuman justice, (which expands as the animal organization becomes higher), that animals shall have and be what their nature and inherent qualities may warrant. Working upward to men, he discovers first a "sentiment of justice", developing later into an "idea of justice" that every man should have what his inherent nature and conduct may merit. This, however, must be modified by the equal right of every other man, and this combination, stated in its affirmative form, Mr. Spencer develops into a "formula of justice" which is that "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."

President Wayland, in his book on the "Elements of Moral Science," written many years ago, declares that justice, when used in the sense in which we are now considering it, "signifies that temper of mind which disposes a man to administer rewards and punishments according to the character and actions of the object."

President Fairchild, in his book on "Moral Philosophy", published near the middle of the last century, declares that justice as a virtue is but another name for benevolence dealing with the interests and deserts of man. "There is an impulse to treat every interest according to its value and every person according to his deserts, and there is satisfaction in witnessing such a result. This characteristic of our nature is often called the principle of justice, but it becomes the virtue of justice when benevolence enters in to regulate and limit it. What is called justice becomes sin when it goes beyond the limits which benevolence appoints."

Professor Lorimer, in his "Institutes of Law," though he works out a very elaborate scheme of natural rights, much the same as that of Mr. Spencer, contends that justice and charity are identical; that their separate realization is impossible, and that their common realization necessarily culminates in the same action.

John Austin, quoting the statement of Hobbes that "no law can be unjust", (which he explains as meaning that "no positive law is legally unjust") declares that justice, when used with reference to legal matters, can mean no more and no less than conformity to the existing law.

Mr. James C. Carter, in his book on "Law, its Origin, Growth and Function," asks "What is justice?" saying that there has been much uncertainty upon the point; that to some it seems to import a sublime attribute, almost an emanation of the Deity, recognizable by an innate

moral sense, while to others it means no more than an expression of what is right or what ought to be done; and he declares that the attempt to form a conception of some absolute attribute which would properly be named justice is an abortive one. He concludes that "justice consists in the compliance with custom in all matters of differences between men."

Professor Pattee in his book on the "Essential Nature of Law," adopts as the definition of justice substantially that of Justinian, though he insists that it has both its subjective and objective sides, and is not complete unless the desire to render to everyone his due is accomplished objectively by securing that it be done.

Professor Paul Elmer More, in his recent "Essays on Aristocracy and Justice," declares that, in a way, justice is easily defined. "It is the act of right distribution; the giving to each man his due," though he proceeds to point out, what must hereafter be more fully emphasized, that such a definition does not carry us very far until some of its terms have themselves been defined.

Professor Sidgwick, in his book on the "Methods of Ethics," devotes a chapter to a very discriminating and interesting discussion of the nature and formula of justice. After pointing out that, in many cases, justice seems to consist of equality among all of a given class and impartiality in dealing with them, he proposes "as the principle of ideal justice, so far as this can be practically aimed at in human society, the requital of voluntary services in proportion to their worth." In concluding his chapter, he says: "The results of this examination of Justice may be summed up as follows. The prominent element in Justice as ordinarily conceived is a kind of equality; that is, impartiality in the observance or enforcement of certain general rules allotting good or evil to individuals. But when we have clearly distinguished this element, we see that the definition of the virtue required for practical guidance is left obviously incomplete. Inquiring further for the right general principles of distribution, we find that our common notion of Justice includes—besides the principle of reparation for injury—two quite distinct and divergent elements. The one, which we may call conservative justice, is realized (1) in the observance of law and contracts and definite understandings, and in the enforcement of such penalties for the violation of these as have been legally determined and announced; and (2) in the fulfilment of natural and normal expectations. The latter obligation, however, is of a somewhat indefinite kind. But the other element, which we have called ideal justice, is still more difficult to define; for there seem to be two quite distinct conceptions of it, embodied respectively in what we have called the individualistic

and the socialistic ideals of a political community. The first of these takes the realization of freedom as the ultimate end and standard of right social relations; but on examining it closer we find that the notion of freedom will not give a practicable basis for social construction without certain arbitrary definitions and limitations, and even if we admit these, still a society in which freedom is realized as far as is feasible does not completely suit our sense of justice. *Prima facie*, this is more satisfied by the socialistic ideal of distribution, founded on the principle of requiting deserts, but when we try to make the principle precise, we find ourselves again involved in grave difficulties; and similar perplexities beset the working out of rules of criminal justice on the same principle."

Professor Willoughby, in his book on "Social Justice," contends that there are no absolute rights, and, defining Justice as the rendering to each individual, so far as possible, of the opportunity for a realization of his highest ethical self,—including therein the general duty of all, in the pursuit of their own ends, to recognize others as individuals who are striving for, and have a right to strive for, the similar realization of their own ends,—concludes that it is impossible to formulate any definite principle or to frame any absolute rules of justice.

An encyclopaedia writer (The New International) says that "Moral justice may, perhaps, be defined as allowing each man such freedom of action, security of possession, and realization of expectations based on custom, as are compatible with the welfare of society"; but, he says, "There is no such thing as an absolute justice if by that is meant any particular method of treatment which any man has a right to expect of society, regardless of the times in which he lives and of the character of his life."

Professor Carver, in his recent "Essays in Social Justice," approaches the question from an entirely different standpoint, namely the standpoint of the State and its functions, and declares that in its most general terms, "justice may be defined as such an adjustment of the conflicting interests of the citizens of a nation as will interfere least with and contribute most to the strength of the nation."

And, finally, in these days, we hear much of a "new morality," and of a "new justice". The characteristic of this new justice is said to be the expansion of the spirit of collectivism instead of individualism, the promotion of the feeling of coöperation, "the exercise by society of its collective powers in support of the legitimate claims of individual life." Its formula is, "To every man according to his needs", rather than "to every man according to his deserts".

As declared in Dewey and Tufts' "Ethics," "The old justice, in the economic field, consisted chiefly in securing to each individual his rights in property or contracts. The new justice must consider how it can secure for each individual a standard of living, and such a share in the values of civilization, as shall make possible a full moral life".

Such quotations might be indefinitely extended but it would serve no useful purpose. Enough have been quoted to show that among the older writers at least, justice was thought to bear a close relation to merit, and might be epitomized in the common formula, "To every man according to his deserts". Upon the theory that desert should not be passive, but that every one should strive to achieve, it is often said that the formula should be, "To every man according to his effort". Without any great violence to its form, perhaps, though it leads to different results, it might be said that every man deserves to have what his strength and nature entitle him to secure; and therefore the formula of justice should be transformed to read,— "To every man according to his strength", or "To every man according to his might". Recently a different conception has been advanced, which may perhaps be thought to lie implicitly in the older statements, though this also leads to a still different conclusion. Every man deserves to have what his inherent nature demands; the matter should therefore be approached from the standard of his needs, and the formula then becomes,— "To every man according to his needs".

No short formula, however, such as any one of these, can do more than express a general thought, and, while it may perhaps serve as a general principle of action, it can not be of much aid in the determination of particular controversies until much more has been agreed upon. As Professor More has pointed out, if we define justice as the act of right distribution, what do we mean by *right*? Or if we say that justice consists in giving to every man his due, how shall we determine what is *due* to him? Have we any general principle by which these inevitable questions can be answered? If all that we have done is to conclude that it is just that a man shall have what it is *right* for him to have, or that he shall have what he *deserves*, what shall be our formula as to *right* and *desert*? Unfortunately, for either of these questions we have no short and conclusive answer, and the determination of them, if they can be determined at all, would take us into wide and disputed fields.

Must we then conclude that, notwithstanding all that has been said about the importance and supremacy of justice, and the function of law and courts and lawyers in securing it, we nevertheless have

no definite principles to guide us and no certain formula by which we can discover what we seek? If that be the conclusion, then it may be urged that our courts have been misnamed and that the end for which we seek is a vague and unattainable one.

It must probably be confessed that we have no precise and definite conception of justice, and it is certainly true that, whatever may be our ideal, we are unable to frame any formula of justice which shall be at once concise and definite and, at the same time, accurately inclusive and exclusive.

Notwithstanding that, however, I think we are not ready to concede that there is no such thing as justice, or that we are not able, in many cases at any rate, to form a concept of it which will furnish us with at least a general principle of conduct. As we search for it, more and more, we may be compelled to revise our statements and enlarge our views. We may not find it so simple as we thought, but it may be really a happy thing, nevertheless, if we are compelled to leave the boundaries always open for the reception of new ideas.

I.

Before coming to any final conclusion, however, respecting the administration of justice in our courts, it may be desirable to point out that, although our courts are commonly spoken of as courts of justice, and though they may have been that in origin, they are not now, distinctly and merely, courts of justice at all, but are courts of law. Courts may undoubtedly exist without any formulated body of law, and primitive courts were unquestionably of that sort. It seems, however, to be a natural if not an inevitable process for courts to develop into courts of law, as the justice administered in individual cases crystalizes into justice administered in classes of cases. Moreover, if we will stop to think about it, we shall see that a vast portion of our law has and can have no necessary relation to any abstract principle of justice at all. It is a growth or development of the rules, sometimes arbitrary, sometimes accidental, sometimes based on custom, sometimes on mere convenience, which in the course of many years have been developed to regulate the affairs of men with reference to matters which involve no moral element. Paradoxical as it may seem, it is true with reference to a vast portion of our law, that if the original rule had been precisely the opposite of the one adopted, justice would have been in no sense violated and convenience might have been as fully served. Take, for example, our vast body of rules respecting land and interests therein and titles thereto and the transfer of such interests or titles. While the question of *any* ownership of land may involve a moral element, the particular forms of titles and estates and the rules of procedure which may

happen to prevail in any given system or at any particular time may involve no question of justice at all, beyond the fact that, *when once they have been agreed upon*, it will be just that they shall be observed until they have been duly changed.

Our vast and complicated body of corporation law presents the same aspect. The bulk of it is made up of a mass of rules and regulations of different countries and under different systems, and which might in many respects be altered at pleasure without doing injustice, except where it would disturb dealings already had in reliance upon the continuance of the present rule. The whole body of corporation law might be repealed and do no injustice to future generations, that is to those not already involved in reliance upon the rules which happen to prevail. The same thing is true about our great volume of law respecting negotiable paper. Justice would not have suffered if there had never been such a mass of rules developed. Many of the rules, are, in origin, mere matters of custom and convenience. No moral principle is involved in the question whether notice of dishonor shall be given within twenty-four hours or forty-eight hours. If we are to play the game we must observe the rules, but justice in most cases goes no further than that. An excellent and familiar illustration is to be found in the rule of the road. In this country we turn to the right when meeting a person or a vehicle. In England they turn to the left under similar circumstances. No moral element is involved, except in seeing that all observe the same rule. Many other illustrations will instantly come to mind, but it is not necessary to enumerate them. In this sense, therefore, the function of our courts is to administer the law and not to administer justice. More than this, any attempt in such cases to appeal to an abstract or any other sense of justice, in defiance of the rules established, would result in chaos and produce injustice rather than justice.

On the other hand, there are cases in which the moral element is involved. The question of crime and its punishment involves many. Many of the questions arising in the field of tort certainly have a moral content, as will be readily seen, although there are still many questions in this field, like most of those falling under the prolific head of negligence, which have no other moral aspect than conformity to the habits and standards of the community, whatever they may chance to be, when once they have become established. The question also of the performance of promises may involve a moral aspect, though the vast mass of our rules respecting the form of the contract, the necessity of writing, the capacity of the parties, the necessity of consideration, and the like, may involve none.

A single illustration from the tort field may serve to show how

even a general formula of justice may be appealed to. It has been much disputed in very recent years, particularly in the matter of employers' liability, as to what are the lawful limitations of liability without fault. Much of the discussion, unfortunately, has concerned itself with the mere question of the constitutionality of the statutes imposing such a liability, rather than with the justice of such a rule. A very general sentiment of justice may here suffice. If there be anything in the instinctive sentiments of animals and men, it shows itself in the repudiation of responsibility where no wrong can be imputed. Even the dog seems to distinguish between merited punishment and being beaten for acts he did not commit. The child's breast swells with injustice upon being condemned for that which he was not morally responsible, and even so general a formula of justice as "To every man according to his deserts", is sufficient to condemn any general conclusion that a man may be held liable without fault, and to brand as sophistical and inconclusive the alleged considerations of policy or otherwise which seek to justify it.

The fact that there are already in our law a number of cases in which men are held liable without fault, seems neither to furnish proof of the justice of the case, nor reason why the number of such cases should be increased. The common law, for example, while it had a less rigorous rule to secure the safety of passengers, held the common carrier of goods to a degree of liability which made him practically the insurer of their safety. This rule was thought to be justified by considerations of policy at the time of its establishment, but that such a rule is just under all circumstances in modern times I suppose no one would contend. The common law liability of the master for the acts of his servant has been carried to a degree which I suppose practically every considerate person would now concede to be unjust, although many considerations of policy and otherwise are advanced to support it. Other instances might be mentioned, but it is not necessary for the present purpose. The principle, however, is important. The danger of violating it is insidious. The excuse is usually that it is merely applying or extending an already established doctrine. We need to remember, as has already been stated, that the mere fact that some unjust rules have been allowed to creep into our law certainly furnishes no reason why we should have more.

It is, of course, to be conceded that nearly all general rules, however just their application may ordinarily be, will occasionally, in a given case, work injustice. This is undoubtedly much to be deplored, though it is probably not to be avoided if the rule is to be maintained. The evil consequence of attempting to introduce some per-

sonal or temporary exception in order to avoid the operation of such a general rule, because it will work injustice in a particular case, is well recognized, and often finds expression in the familiar adage that "Hard cases make bad law". No system of law, moreover, attempts to enforce all just conclusions by law. The alleged maxim that wherever there is a right there must be a remedy does not mean that wherever there is a *moral* right there must be a *legal* remedy. Many rights are left to other than legal machinery for enforcement.

The institution, peculiar to our system, of a separate court of equity has furnished many opportunities for doing justice in cases to which the legal rule did not extend or in which for some reason the operation of the legal rule could be avoided. Whatever they may have been in their origin, however, our courts of equity have long ceased to be tribunals in which purely equitable considerations applicable only to a particular case may find expression. Rightly or wrongly, our courts of equity tend to become courts administering what is called equity in accordance with more or less general rules, and they rarely venture in these days to strike out into wholly new fields.

It is sometimes urged that our courts of law should adopt more fully the ideas originally underlying the administration of equity, or, at any rate, that judges should be clothed with and should exercise a very much wider degree of discretion for the furtherance of justice in particular cases than they now possess and exercise. While there are undoubtedly cases in which a greater degree of discretion might safely be exercised, two considerations at least seem at present to stand in the way of the wide adoption of such a rule. One is that both in England and America there is a deep rooted and long standing distrust of any large degree of discretionary power vested in any official or tribunal; and the second is that discretion in the determination of the rights and liabilities which arise from ordinary business transactions is fatal to the continuance of any widespread business dealings among men. Dealings involving faith or credit in the future can only thrive where some more or less definitely settled rule, rather than mere discretion, is to determine what the future shall bring forth.

Even if it should be agreed that certain existing rules of law were unjust, it would not ordinarily be within the province of courts to change them when once they have become established. Courts do, of course, occasionally overturn rules established by judicial decisions, and it is perhaps true that they ought to do it more frequently than they do, but the evil effects of an *ex post facto* change of an established rule—and this is practically the only way in which

courts can deal with it—are so obvious that courts are naturally reluctant to undertake it. With respect of rules laid down by the legislature, courts will practically never attempt to change them because they are thought to be unjust, nor will the courts refuse to enforce new statutes for that reason, unless the legislature is found to have exceeded its constitutional authority.

II.

But it is not alone in the administration of law in courts that justice is essential, although this is the field that concerns the law as a profession most strictly. Back of law and courts and lawyers are the great facts of life and living. There is the great fact which we call the existence and organization of society,—the fact that in all civilized communities at least, men live and are forced to live under and subject to rules, regulations and traditions which control their lives and conduct in such an inexorable manner that few, if any, can escape them. Widespreading, longstanding and apparently all-powerful traditions or institutions have become established, which mould and control the lives and activities of men, not only from birth to death, but not infrequently long before birth and long after death. The institutions of government, of family, of law, of property, of inheritance, of social order, and the like, all affect and influence, if they do not control, the lives, the activities and the aspirations of the human beings who are subject to them. If justice be essential in the ordinary administration of law in courts, how equally is it essential that in the formation and operation of these institutions the rules of justice should be observed. It is to this field that the more or less vague and much abused expression “social justice” applies.

Although, as has been stated, the lawyer’s immediate field may be thought to be the administration of justice in the courts, his interest in this other field can be only secondary, not only because as a human being he also is subject to the institutions which may prevail, but because of the fact that, from the beginning of our government to the present, lawyers have always taken a leading, if not a predominating, part in legislation and government.

It will be obvious at once that we have here an entirely different situation, characterized by wholly different and less definite procedure. In the field of ordinary law, if an individual believes that his right has been denied him, or injustice has been done him by some other individual, he finds ready to his hand certain and definite machinery by which he may bring the question to a determination. Here are courts and officers and process, of which he may freely avail himself, and through which he may hope to secure justice. But in

the other field how different is the situation! The individual, who feels that he is deprived of his right by the operation of the existing institutions of society, can find nowhere ready to his hand any tribunal whose duty it is to hear his complaint, and which is clothed with power to grant him the necessary relief. The evil that he complains of may go to the root of all existing legal institutions. Even if he complains, his voice may seem to be merely that of one crying in the wilderness, and if there be any tribunal to which he may appeal, it is merely to the vague, largely unorganized, uncertain, slow tribunal of public opinion. To such a tribunal the single man or even large numbers of men may often appeal in vain, as the whole history of human progress demonstrates. In despair of making himself otherwise heard, he may resort to violence, revolution or the destruction of institutions.

Notwithstanding all the difficulties involved, there can be no general and permanent justice among men unless there be justice in these fundamental relations and institutions which control their lives and fortunes. It is here that the greatest dissatisfaction is being manifested at the present moment. Many people, in many places, are calling loudly for what they term justice. Part of them, it is obvious, have no definite idea in mind. It is merely a "vague unrest", a "nameless longing" which fills their breast. Others have, if not a principle, at least a program. Others, still, are searching with real insight and sympathetic interest into the situation, and are seeking to find a remedy. Unfortunately, some of these are tempted to proclaim the remedy before they have really found it. Many of the proposed remedies will not bear analysis. Nevertheless, the problem must be confronted. What is meant by justice in this field? Unfortunately, our concepts are here less definite than they were in the field of judicial justice, and the whole situation makes a formula of justice still more difficult to agree upon than it is in that field. In the field of judicial justice we may get one man separated from his fellows, the opposite party will be definite and certain; the issue will be concise and capable of being framed into some specific demand; but in the field of so called social justice the complainants may be whole masses of men, smarting under a sense of injustice, but with no definite antagonist and with no claims that can as yet be made certain and specific.

As has been stated, a great variety of conceptions and formulas of justice have been formed and stated for this field, and several of those referred to in the earlier part of this discussion have been those which were primarily intended to operate here. They involve the whole question of the organization of Society, the nature and function of the State, the nature of rights,—whether natural or

legal,—the foundation of institutions like marriage, or the right of private property, or the right of inheritance. These questions have been the fruitful subject of controversy and discussion since man became conscious of them and of their influence upon his life and happiness. Vast speculation has been indulged in, and scores of volumes written, concerning the nature of man and his claim to what are termed “rights”. Equally prolific has been the discussion respecting the origin and nature and function of the State. A great variety of theories have been promulgated, each of which has had its adherents, all ready to insist that the adoption of their particular theory would solve the problems of human life and happiness. Individualism, collectivism, utilitarianism, socialism, communism, anarchism—all have had their advocates. In a large measure the controversy, as nearly as it can be stated in a word, has been whether Society makes man, or whether man makes Society. At one time the individualistic organization of society has seemed to be in the ascendancy, while in another the socialistic or collectivistic form has promised to prevail.

How far apart these two conceptions are, may perhaps be shown by contrasting one of the classical statements of the principle of individualism with some of the principles declared in more recent times. In 1859 John Stuart Mill published his famous “*Essay on Liberty*”. “The object of this essay”, he said, “is to assert one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection; that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warranty. He can not rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right.”

“These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society is that which concerns others. In the part which merely concerns him-

self, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

As against this, the principle, so freely asserted in modern times, that what is called Society or the State may coerce the individual, control his method of living, restrict his hours of labor, and restrain his power of contract, not merely for the general good, but also for his own, furnishes a very striking contrast.

I have no desire, nor would the present hour afford the time, to consider at length the many modern problems which such a difference of view presents. I must content myself with referring to but two or three, and then only so far as to point out some of the larger questions of justice which are involved.

Take, for example, the question of the justice of private ownership of land. Over this question has raged a long controversy, which is by no means at an end. It has often been and still is contended that private ownership of land is neither just nor expedient. Those who have it are frequently termed "robbers", and the demand is made that Society or the State shall dispossess these robbers; and, because all of the present holders are either themselves robbers or because their holdings originated in robbery by someone else, it is insisted that Society, in appropriating the land, need make no compensation to the present holders, however much they may have acquired it in actual good faith and for value in reliance upon existing laws and usages of Society.

In a recent discussion in the public press, one writer contended, that, while something could be said, in the distribution of the products of industry, for a return to capital and management as well as to labor, nothing could be said for any return to the owners of the land. I do not desire to enter into any extended discussion of this question, and, indeed, I believe that the weight of modern opinion is against any general right of the state to appropriate the land without compensation to the present owners. As bearing upon the justice of any such claim to appropriate without compensation, I wish merely to call attention to what has been going on in this country from the beginning, and especially to events a large part of which have actually transpired within my lifetime. Soon after the establishment of the Federal Government, the United States came into what was claimed to be the unquestioned ownership of large tracts of unoccupied land in the West and Northwest. This area was increased by the Louisiana Purchase, by the events following the war with Mexico, and by discovery and settlement in the Northwest, until the United States came to be the so-called owner of a vast territory of unoccupied and unproductive public land.

To secure settlers to develop this land was thought to be a matter of great public importance, and became the subject of a settled public policy. Settlers were invited to enter upon, occupy and improve it. Immigration was welcomed. Railroads and other highways were encouraged to make the territory accessible and hasten its settlement, and their projectors were often offered portions of the land if they would raise the money and construct their works. Interests in it were offered as bounties or compensation to soldiers and sailors for their patriotic services in times of war. To all these, the government offered to transfer a so-called absolute title to the land, which title the government purported to assure to the settler and to his heirs and assigns forever. Acting upon these invitations hundreds of thousands of men and women entered upon the endeavor to settle and improve the country. Leaving their homes and associations in the east, cutting themselves off not infrequently from friends and society, exposing themselves often to attacks by savage Indians, braving the diseases and discomforts incident to a new territory, they took upon themselves all the hardships and privations of the pioneer. They subdued forests, removed stones from fields, drained swamps, built roads and bridges, created governments, erected school houses and churches, built towns and villages, established society, and in general performed all the labor and endured all the sacrifices necessary to change an unsettled waste into established communities fitted to maintain life and to sustain and promote human society. To even make life tolerable, to give any value to the land and to make a place fit for habitation for succeeding generations, more than one generation of pioneers expended its life and strength. We have all seen them, these pioneers, horny-handed and bent of back, laboriously toiling to make a civilized community where otherwise there would be but a wilderness. All this they did in reliance upon the solemn assurances of the highest authorities in the nation that, when they had complied with the conditions which the nation prescribed, the land which they had thus transformed from a wilderness should belong to them and to their posterity. Now, whatever may be thought about the abstract right of the government to own this land, or the attempt to transfer ownership to individuals, to say that those who have acquired it and given to it its value under circumstances such as these are to be denominated robbers, and to be summarily ejected without compensation, is at least a startling proposition and one which makes very little appeal to any sense of justice, rudimentary or refined, which it is possible to entertain. Upon this question I quote from a recent book by a writer who certainly cannot be denominated a "reactionary" or "hide-bound conservative"—

Professor Jethro Brown, in the "Underlying Principles of Modern Legislation,"—"Nor can I see how the State can be justified in ignoring those rights of property which individuals have acquired in the past with its express approval and positive sanction. The State may have erred in parting with the freehold of the land; some people may possess too much land and some people too little; and the time may have come to substitute public for private ownership of land. But, in seeking to effect reforms in these directions, the State must be loyal to the moral obligations it has incurred in the past."

The question of the amount which that which we call "labor" may justly take from the results of industry, or, in other words, the wages which labor may justly demand, is another of the matters concerning which it is contended that the present rules and institutions of society do not establish justice. I personally believe that this contention is in large measure well founded, but the determination of what portion justice demands, is by no means easy. If we take for our principle that justice demands that to "Every man shall be given what he deserves or what is his due", how shall we determine what this amount is? It is of course possible, if one accepts the extreme views often put forward, that labor is entitled to all of it, to make short work of the problem; but if we do not accept this extreme view, and demand some basis of just distribution, the question at once arises, What shall that basis be? In general, it has long been and still is the prevailing view of the civilized world that a thing is worth what it will bring when exposed to competitive sale in the public markets. This has been and, in general, still is the accepted view with reference to the value of labor; but of recent years there have been many claims that it is unjust to labor to submit its just share to this form of competition, and a variety of efforts have been made, chiefly in the form of labor unions, which should by one means or another prevent competition, to establish a different basis for determining compensation. That this method has produced some improvements can not be denied, but that it is a satisfactory method can not be asserted. It often leads to violence and oppression, and results in much partiality and inconsistency. At the present moment, for example, it is insisted that persons who furnish labor may be freed from the necessity of competition, while those who have put their labor into supplies which they contribute to the common end, and which are clearly nothing but labor in another form, shall be required to compete, while he who attempts to combine the labor and materials of others into a finished product to which he has contributed his own labor, skill and business foresight, is condemned as a criminal and punished accordingly, if, instead

of competing in the open market for a purchaser, he attempts to pursue the methods which labor demands as lawful for itself. Both situations cannot be right or just, and the reasons, for example, which are alleged for such discrimination under the Sherman Act and the Clayton Act do not approve themselves to the impartial mind.

This question of the apportionment of wages is obviously one of very great difficulty. If it is not to be settled by the contract of the parties, or by contract plus such influences as labor unions can bring to bear, it must be settled by some outside authority. Many schemes have, of course, been suggested: fixing all wages by law, prescribing a minimum wage, leaving it to experts, creating wage boards with coercive or merely persuasive powers, and the like. Practically all of these have been tried in various countries or are being tried. Some of them seem to offer valuable possibilities; but it is a very significant thing that the one which, on the face of it, seems to offer the most flexible and efficient aid, namely, the wages board, is quite generally repudiated by the very ones it was designed to aid, namely, the laboring classes, or especially, the labor unions. In the recent book of Professor Jethro Brown on the "Underlying Principles of Modern Legislation", he says: "While a powerful party in England are fighting for the wages board, an advanced wing of the labor party in Australia, where experience has been gained of the working of that institution, is speaking of it with contempt. A strike is much more exciting and picturesque; and it is proving a more immediately effective means of raising the rate of wage".

In the last number (Oct.-Dec., 1915) of the *Unpopular Review*, an unnamed "Trade Unionist" states why the unions oppose the wage boards. They "would embarrass the organization of labor", "clip the wings of the unions", and "restrict the opportunities of labor to voice its demands in its own way". "A wage board considers what capital can pay. This is not the business of a union". Aside from these objections, it is also urged that the boards are unrepresentative and that their minimum wages tend to become the maximum. What labor unions wish, declared one of their leaders recently, according to the public press, is not the securing of their demands through legislation, but merely the removal by legislation of such legal restraints as would prevent the unions from securing their ends by their own means.

It is frequently asserted at the present day that one of the so-called rights, which justice demands shall be accorded to the individual, is the right by labor to have and acquire the essential conditions of existence. Whatever may be thought about so-called natural rights in general, there would seem to be no difficulty in

agreeing that some such right as this could safely be asserted. The question, however, at the outset, is what it means. It may mean, for example, that justice requires that every man shall be given a free and equal opportunity to earn his living in the world by his own efforts if he can find work to do. In general, this is what in the past has been deemed to be the nature of the right. That a given man may not always be able to find work to do, or by it to secure the essentials of life, is one of the possibilities of the conditions under which the struggle for existence in the past has been carried on. That it is not in many cases a very productive right under actually existing conditions can not be denied. In contrast with this situation, what in these days has often been denominated the "new justice" or "social justice" asserts a radically different purpose. Not only has a man the right to labor if he can find work to do, but it is the duty of Society or the State to see that adequate labor is supplied him, or, if not, to support him at the public expense. How such a proposal looks when put into words may be seen from the terms of a bill recently urged for adoption in the English House of Commons.

"Where a workman has registered himself as unemployed it shall be the duty of the local employment authority to provide work for him in connection with one or other of the schemes hereinafter provided or otherwise; or, failing the provision of work, to provide maintenance should necessity exist, for that person and for those depending on that person for the necessities of life; provided that a refusal on the part of the unemployed workman to accept reasonable work upon one of these schemes of employment, upon conditions not lower than those that are standard to the work in the community, shall release the local unemployment authority of its duties under this section".

Much nearer home than this, the State of Idaho has actually enacted a "Right to work" law. Under this law it is provided that any citizen who has lived in Idaho for six months and in the county for ninety days, and who shows that he can not find other employment and has less than \$1,000 in property, may demand and the public authorities must provide him with work upon the highways, though not more than sixty days work may be demanded in any one year.

However sound such proposals as this may be, they certainly suggest interesting reflections. If, for example, every man has a right to demand work or support from the State, when and where does justice permit him to claim it? May he choose his own time and place? May the newly arrived immigrant, who has left his native land for reasons satisfactory to himself, select Omaha or Chicago

as the place at which he will demand his right, without any consultation with the authorities concerning this selection? If we, in the United States, are bound to furnish work to all, does justice require that our doors be opened without restriction to the adventurous or needy of all nations? And if society is to undertake this burden, have the proponents contemplated or considered not only what is the principle of justice involved, but also how the principle will work in view of the enormous changes and increases in our governmental machinery,—with all the inevitable consequences of politics, favoritism, graft and corruption,—which will be necessary before society can equip itself with the means and instrumentalities for supplying work to every comer?

But the demands of the new justice do not stop with the insistence that the State shall provide labor where the individual is not able to provide it for himself. It goes much further. The doctrine, "To every man according to his need", required that (to use actual illustrations recently put forward by the proponents of this principle) if the individual needs medical or surgical care and is not able to provide it for himself, the State or Society shall furnish it for him. If the child of a poor man falls ill and there is need for a specialist or perhaps a number of specialists, whose compensation the poor man is unable to pay, it is the duty of the State or of Society to see that such expert services are provided. Many other suggestions of the same sort are constantly being made. For the present I do not mean to question any of these proposals, and indeed, I am personally in entire sympathy with a considerable number of them. I simply mean to call attention to some of the considerations that are involved if we are to put them into effect within the near future. There are involved, for example, all of the difficult and puzzling questions, upon which we are by no means agreed, as to what we mean by the State or by Society; what are its functions and what are its resources. If Society or the State is simply the aggregation of all of us, then the proposal is that all of us shall supply each of us with what each of us needs and can not otherwise acquire. Inasmuch as the State under its present form of organization has no independent sources of revenue and must derive everything from taxation, it means that all tax-payers shall be taxed to supply those who need; and, since the proportion of those who pay any direct taxes, to those who do not, is very small, a few are to be taxed to supply the possible needs of a very large number. The only alternative is that of the new member of the legislature in the apocryphal story who proposed that, since taxes were such a burden, no taxes should be levied, and when asked how the expenses of the government would be borne under

such a scheme, replied that it was very easy:—"Simply pay them out of the State Treasury". Seriously, however, the only alternative is a considerable if not a complete reorganization of society in such a manner as will give the state larger revenues and more direct access to the wealth of the community. Such reorganization is of course already demanded in many quarters. Many schemes for it have been proposed. Some of them seem moderate and workable, others are more extreme. That the State shall take over, control and operate all of the industrial enterprises of the community, is a proposal frequently urged. Into the obvious difficulties and complications of such an extension of the State's functions, the present occasion does not furnish the time or the opportunity to inquire. But certainly it is pertinent to consider whether the capacity which our public political authorities have thus far shown for the honest, efficient and economical management of business enterprises, or the sense of justice which the public has displayed in attempting to regulate and control the property interests of individuals and corporations, is such as to justify us, in the near future, in entering upon such enormous and important undertakings as these more extreme schemes contemplate, and especially whether, in the long run, justice is likely to be promoted or retarded thereby.

Another point at which it is urged that our existing system works injustice is the matter of our inheritance laws. It is contended that, whatever justice may require with respect to private ownership of land or other property during the lifetime of the individual who has acquired it, justice does not demand that it shall go in unlimited quantities to those who have done nothing to earn it and whose claim to merit or desert with reference to it could not be discovered. With much of this contention I am entirely in accord. With the practice prevailing in some States, for example, of creating long time trusts for the accumulation of vast sums of money for the benefit of those who become a mere idle, luxurious and self-indulgent class, no sensible person can have much sympathy. One of the proposals for remedying the evils of inheritance is an inheritance tax. Several states now have such taxes, and a proposal to enact a federal inheritance tax is said to be upon the program for the present session of Congress. Much discussion is also being had in the public press, respecting the advantages of such a tax. However much one may be in sympathy with such a measure, many of the proposals that are advanced can not fail to arouse apprehension.

The original and fundamental purpose of all taxation has been supposed to be to derive revenue for the necessary and proper expenses of the government. In addition to that, the theory has been

established that taxation may be resorted to, not primarily for the purpose of revenue, but for the purpose of repressing or destroying particular activities or forms of property which are thought to be undesirable. A Federal tax upon state bank notes to prevent their circulation, or a State tax upon the manufacture and sale of intoxicating liquors to repress activity in those lines, are familiar illustrations. That such a principle involves the possibility of grave abuses requires no argument to prove. To declare unlawful and contraband today what yesterday was lawful and legitimate can only be justified by the stress of very unusual conditions.

Proposals for an inheritance tax, however, are not infrequently based upon an entirely different theory, namely, that taxation may be resorted to as a purely social measure, not to raise necessary revenue, but to "reduce swollen fortunes", equalize ownership, and, in general, to "even up" the inequalities of fortune which have been developed under our form of social organization. In such a proposal, to be applied by those who have no swollen fortunes to those who have, there lurk many opportunities for injustice.

The question, moreover, of what shall be done with the proceeds of a Federal inheritance tax is worthy of consideration. If such a tax were applied upon the basis frequently proposed, it would bring into the Federal treasury a vast sum of money. Moreover, since it would not ordinarily be wise to insist upon payment in cash where this would involve the forced sale of large quantities of securities, the tax would usually be collected in the securities themselves; and the Federal government would thus become the holder of large amounts of corporate securities which it must hold until they could be disposed of under fair circumstances. Not only would this make the government a partner in many corporate enterprises, but it at once raises the question, What shall be done with the fund produced? A number of writers in the public press have, within the last few weeks, discussed the subject, and offered various solutions. I cannot here discuss them. But it is obvious to suggest that no great gain in justice will follow if the only result of such a tax shall be to add to the sums which an already extravagant Congress may expend upon unwise and improvident measures, or distribute as "pork" among hungry constituents.

It was originally the theory, and not infrequently the fact, that those who voted taxes were the ones who would have to pay them, and in this theory and fact was found a preventive of unjust and oppressive levies. One of the striking evils, however, of the present time is found in the fact that, in large centers of population particularly, the situation has largely come to be that one class votes the

taxes for another class to pay. Like income taxes with a large exemption, it may easily come to be that the great mass of the community impose burdens which should be common, upon a small minority unable to resist them. As stated recently by President Tucker, in the *Atlantic Monthly*, "Few will question the justice of a cumulative tax, even at a high rate of progression, but surely a tax is far from being democratic which altogether exempts the vast majority of property holders, reaching under the present law but one half of one per cent of the whole population. In any conscientious interpretation of democracy it ought to be as humiliating to the average citizen to be exempt from taxation as to be passed over in the call to arms for the defense of the country".

The whole situation may be illustrated by a statement I recently heard from a prominent member of one of our legislative bodies. When one member of a committee, which was considering a proposed measure, objected that the whole scheme was unwise and unnecessary; that the amounts involved were extravagant; and that the salaries to be paid to the incumbents of the proposed offices were out of proportion to the service to be rendered, the reply was, "Why do we need to be so d——d particular? It isn't *our* money we are spending".

This criticism, moreover, is not confined to this particular field. The tendency in every field of so-called reform, to establish burdens for others to bear, to impose liabilities upon the few for the benefit of the many, and generally to regulate the lives and conduct of other people but not of ourselves, is one of the most alarming characteristics of the age. The easy and cheerful manner in which many of our light-hearted reformers propose to destroy legally created interests, abolish existing institutions, and overturn traditions which have their roots deep down in the sources of human experience, is not only startling in itself, but indicative of what an immature and irresponsible demand for change may do when once it "turns itself loose". Many changes are bound to come. Some of them will doubtless work for justice. Our problem will be to see that, in doing what is thought to be justice to some, we do not do equal or greater injustice to others who are no less meritorious. What we need in these days is, to use the language of a distinguished university president, less organized emotion and more organized intelligence. Herein, I venture to think, is to be found an opportunity for the intelligent and enlightened profession to which you belong.

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